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Kentucky Tort Law: Defamation and the Right of Privacy

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Kentucky Tort Law: Defamation and the Right of Privacy

SPECIAL BOOK REVIEW

Kentucky Tort Law: Defamation And the Right of Privacy

By David A. Elder

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Kentucky Tort Law: Defamation and the Right of Privacy is the first of a planned three-part treatise on Kentucky tort law by Professor David A. Elder of Northern Kentucky University's Chase College of Law. The second volume, *Negligence and Related Matters*, now in progress, will cover negligence, professional malpractice, strict liability and products liability. The final volume, *International Torts and Related Matters*, will include assault and battery, false imprisonment, trespass to land, conversion, intentional infliction of emotional distress, misrepresentation, business torts and misuse of legal process.

Based on an examination of the first volume, *Kentucky Tort Law* should be a valuable practice aid for Kentucky attorneys. The treatise is comprehensive and well-organized, the writing style is clear, and the material is presented in an orderly and logical manner. In addition, the section headings are accurate and informative, thereby allowing the reader to look up specific issues quickly. The index and the table of cases are also useful for this purpose.

The quality of Professor Elder's research is impressive. Virtually every Kentucky case on defamation and privacy is either cited or discussed. The leading federal decisions are also covered along with significant cases from other states. As is customary in works of this sort, the author concentrates on describing legal doctrines and generally avoids criticism or suggestions for reform. On occasion, however, critical comments are unavoidable. One example concerns the way libel and slander are treated

differently.[1] In Kentucky, as in most other jurisdictions, a written statement[2] is actionable without proof of special damages[3] if it is defamatory on its face.[4] In contrast, an oral statement is not actionable without proof of special damages unless it falls within one of the categories of slander per se.[5] These include imputation of one of the following: (1) a serious crime;[6] (2) conduct affecting one's fitness for office, trade, occupation or business;[7] (3) loathsome disease;[8] or (4) unchastity in a woman.[9] Although the method of publication may have some bearing on the extent of the plaintiff's damages, it provides no rational basis for separate rules with respect to liability.[10]

Professor Elder is also critical of the treatment given in Kentucky to written statements which are not defamatory on their

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[1] *See* D. ELDER, KENTUCKY TORT LAW: DEFAMATION AND THE RIGHT OF PRIVACY § 1.06 at 35 (1983) [hereinafter referred to as KENTUCKY TORT LAW].

[2] Defamatory material which is either written or printed is treated as "libel." *See, e.g.*, Bonham v. Dotson, 288 S.W. 297 (Ky. 1926) (letter); Foster-Milburn Co. v. Chinn, 120 S.W. 364 (Ky. 1909) (advertisement); Evening Post Co. v. Hunter, 38 S.W. 487 (Ky. 1896) (newspaper). In addition, radio and television broadcasts are treated as libel in many jurisdictions. W. PROSSER, THE LAW OF TORTS § 112 at 753 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 568A (1977). *But see* KY. REV. STAT. § 411.061 (Bobbs-Merrill 1982) (providing special rules for defamation actions involving radio and television).

[3] Special damages involve a pecuniary loss or the loss of some substantial or material advantage. The loss must flow directly from impaired reputation. Taylor v. Moseley, 186 S.W. 634, 636-37 (Ky. 1916).

[4] A written statement that is defamatory on its face is called "libel per se." A written statement not defamatory on its face is known as "libel per quod." KENTUCKY TORT LAW, *supra* note 1, at § 1.08. *See* notes 11-14 *infra* and accompanying text.

[5] *See* Courier-Journal Co. v. Noble, 65 S.W.2d 703 (Ky. 1933).

[6] *See* Miller v. Woods, 338 S.W.2d 412, 413 (Ky. 1960) (poisoning mother); Jones v. Grief, 131 S.W.2d 487, 489 (Ky. 1939) (theft); Deitchman v. Bowles, 179 S.W. 249, 250 (Ky. 1915) (robbery).

[7] *See* Weinstein v. Rhorer, 42 S.W.2d 892, 894-95 (Ky. 1931) (statement impugning city attorney's fitness for office); Register Newspaper Co. v. Worten, 111 S.W. 693, 697 (Ky. 1908) (statement associating attorney with criminals). *See also* White v. Hanks, 225 S.W.2d 602, 603 (Ky. 1953) (alleged slander per se required an imputation of fraud, deceit, or dishonesty on the part of a used car salesman).

[8] *See* Conner v. Taylor, 26 S.W.2d 561, 562 (Ky. 1930); Sally v. Brown, 295 S.W. 890, 891 (Ky. 1927) (both cases characterize venereal diseases as infectious diseases likely to exclude persons from society).

[9] *See* Holman v. Plumlee, 267 S.W.221, 222 (Ky. 1924); Nicholson v. Rust, 52 S.W. 933, 934 (Ky. 1899).

[10] *See* Baker v. Clark, 218 S.W. 280, 282-83 (Ky. 1920) (while noting the inconsistency, the Court considered the distinction too "well-rooted" in the law to question).

face.[11] At common law all libel, whether defamatory on its face or not, was actionable without proof of special damages.[12] However, in some American jurisdictions, statements which are not defamatory on their face are called libel per quod[13] and treated like slander.[14] Although the case law in Kentucky is ambiguous,[15] Professor Elder argues that all libel should be actionable without proof of special damages.[16]

Volume one of *Kentucky Tort Law* is divided into three chapters. The first is devoted to the traditional law of libel and slander. Among the topics covered are the nature of a defamatory communication, colloquium, the publication requirement, the single publication rule, slander per se and special damages, libel per se and libel per quod, absolute and qualified privileges, punitive damages at common law, and the effect of retraction statutes.

Chapter two deals with recent developments in the law of defamation. The discussion begins with an analysis of the traditional fair comment privilege, concluding that fair comment historically extended to expressions of opinion but not to erroneous

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[11] *See* KENTUCKY TORT LAW, *supra* note 1, § 1.08, at 110-15.

[12] *See* Eldredge, *The Spurious Rule of Libel Per Quod*, 79 HARV L. REV. 733, 736-37 (1965-66); Henn, *Libel-By-Extrinsic Fact*, 47 CORNELL L.Q. 14, 22-23 (1961-62).

[13] At common law, the plaintiff was required to set forth the extrinsic facts needed for the reader to understand the statement's defamatory meaning in the "inducement" portion of the complaint. In the "innuendo" portion of the complaint, the plaintiff was required to explain and establish the defamatory meaning of the communication with reference to these extrinsic facts. Ausness, *Libel Per Quod in Florida*, 23 U. FLA. L. REV. 51, 51 (1970).

[14] *See* Prosser, *Libel Per Quod*, 46 VA. L. REV. 839, 848-49 (1960).

[15] *Compare* Hill v. Evans, 258 S.W.2d 917 (Ky. 1953) (where defamatory newspaper article was libel per quod, plaintiff could not recover without allegation and proof of special damages); Towles v. Travelers Ins. Co., 137 S.W.2d 1110 (Ky. 1940) (where publication of agency suspension was held to be libel per quod, court required proof of such special damages as were directly and proximately caused); Sweeney & Co. v. Brown, 60 S.W.2d 381 (Ky. 1933) (where letter was characterized as libel per quod, court held such libel was only actionable where special damages resulted) *with* E.W. Scripps Co. v. Cholmondelay, 569 S.W.2d 700 (Ky. Ct. App. 1978) (where newspaper article is defamatory per se, no legal malice or special damages need be proven).

[16] *See* KENTUCKY TORT LAW, *supra* note 1, § 1.08, at 113-15. Elder discusses the confusion in the Kentucky decision on libel and slander per quod and outlines seven reasons why the Kentucky Supreme Court should abandon the "per quod" special damage hurdle. *Id.*

statements of fact.[17] The author then examines *New York Times Co. v. Sullivan*[18] and other decisions[19] which have held that public officials and public figures[20] cannot recover damages in libel actions, even in the presence of factual inaccuracies, unless they prove the existence of actual malice on the part of the defendant.[21]

The remainder of this chapter is largely concerned with the issues raised by *Gertz v. Robert Welch, Inc.*[22] In *Gertz*, the United States Supreme Court ruled that ordinary negligence was sufficient to support an action for defamation against a media defendant if the plaintiff was not a public figure.[23] There is also a lengthy discussion of *McCall v. Courier-Journal & Louisville Times Co.*,[24] a recent decision in which the Kentucky Supreme Court, in accordance with *Gertz*, adopted a negligence standard and rejected the more rigorous "actual malice" standard.[25]

Another question raised by *Gertz* is whether expressions of opinion are absolutely privileged.[26] According to the Restatement of Torts, a defamatory communication in the form of an opinion is actionable only if it implies the allegation of undisclosed *defamatory* facts as the basis for the opinion.[27] An opinion based on disclosed or assumed *nondefamatory* facts is absolutely

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[17] *See* KENTUCKY TORT LAW, *supra* note 1, at § 2.01 (A). The author relies on Cole v. Commonwealth, 300 S.W. 907, 911 (Ky. 1927) for this conclusion.

[18] 376 U.S. 254 (1964).

[19] Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157 (1979); Herbert v. Lando, 441 U.S. 153 (1979); Time, Inc. v. Firestone, 424 U.S. 448 (1976); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Rosenbloom v. Metromedia, 403 U.S. 29 (1971); St. Amant v. Thompson, 390 U.S. 727 (1968); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

[20] See Curtis Publishing Co. v. Butts, 388 U.S. at 154-55 for a discussion of the differences between these two concepts.

[21] The "actual malice" standard imposes liability where the defendant publishes a statement with knowledge that it is false or with reckless disregard of whether it was false or not. New York Times v. Sullivan, 376 U.S. at 280.

[22] 418 U.S. 323 (1974).

[23] *Id.* at 347-48.

[24] 623 S.W.2d 882 (Ky. 1981), *cert. denied*, 45 U.S. 975 (1982). *McCall* is also discussed in Mobley, Kentucky Law Survey-Torts, 70 KY. L.J. 527, 529-42 (1981-82).

[25] 623 S.W.2d at 886. Professor Elder notes that the adoption of a simple negligence standard in *McCall* is consistent with that of the majority of state courts in the post-*Gertz* era. *See* KENTUCKY TORT LAW, *supra* note 1, § 2.11 at 395.

[26] *See* KENTUCKY TORT LAW, *supra* note 1, § 2.04.

[27] RESTATEMENT (SECOND) OF TORTS § 566 (1977).

privileged, no matter how unjustified, unreasonable, or derogatory the opinion may be.[28] Professor Elder notes[29] that the Kentucky Court of Appeals in *Haynes v. McConnell*[30] applied the Restatement rule and held that an opinion based on disclosed true facts was absolutely privileged.[31]

The author also considers whether truth remains an affirmative defense after *Gertz*, or whether the plaintiff is now required to prove that the defendant's statement was false.[32] According to Professor Elder, the Restatement of Torts makes a persuasive argument for imposing the burden of proving negligence in the case of a private figure on the plaintiff: "As a practical matter, in order to meet the constitutional obligation of showing defendant's fault as to truth or falsity, the plaintiff will necessarily find that he must show the falsity of the defamatory communication."[33] Professor Elder observes that the Sixth Circuit Court of Appeals in *Wilson v. Scripps-Howard Broadcasting Co.*[34] held that as "a matter of federal First Amendment law, the burden must be placed on the plaintiff to show falsity."[35] However, he also notes that the Kentucky Supreme Court in *McCall v. Courier-Journal & Louisville Times Co.*,[36] declared that the adoption of a negligence standard "did not imply any change in the basic common-law and statutory rule [regarding defamation] as expressed and interpreted by this court in the past."[37]

Finally, the author discusses whether the first amendment principles embodied in *New York Times* and *Gertz* should apply to non-media defendants.[38] Although Chief Justice Burger suggested

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[28] RESTATEMENT (SECOND) OF TORTS § 566 comment c (1977).

[29] *See* KENTUCKY TORT LAW, *supra* note 1, § 2.04, at 353.

[30] 642 S.W.2d 902 (Ky. Ct. App. 1982).

[31] *Id.* at 904.

[32] *See* KENTUCKY TORT LAW, *supra* note 1, at § 2.06(B).

[33] RESTATEMENT (SECOND) OF TORTS § 580B comment j (1977). Most commentators have also taken this position. *See, e.g.*, Collins & Drushal, *The Reaction of the State Courts to* Gertz v. Robert Welch, Inc., 28 CASE W. RES. L. REV. 306, 339-42 (1978); Robertson, *Defamation and the First Amendment: In Praise of* Gertz v. Robert Welch, Inc., 54 TEX. L. REV. 199, 246, 267 (1976).

[34] 642 F.2d 371 (6th Cir. 1981).

[35] KENTUCKY TORT LAW, *supra* note 1, § 2.06(B) (quoting from 642 F.2d at 376).

[36] 623 S.W.2d at 882.

[37] *Id.* at 886.

[38] *See* KENTUCKY TORT LAW, *supra* note 1, at § 2.07, at 365-66.

in *Hutchinson v. Proxmire*[39] that the Court had not yet determined that the actual malice standard would apply where a nonmedia defendant was involved, most of the cases decided since *New York Times* have required that actual malice be proved when the plaintiff is a public official or a public figure, regardless of the status of the defendant.[40] Professor Elder believes that this position is correct and will ultimately be upheld by the Supreme Court.[41]

The last chapter of volume one is concerned with the right of privacy. Professor Elder traces the history of the privacy concept from its seminal treatment in the Warren and Brandeis article of 1890[42] to the incorporation of Dean Prosser's theories[43] into the Restatement of Torts.[44] According to the Restatement, there are four distinct types of invasion of privacy: (1) appropriation of name or likeness; (2) intrusion upon seclusion; (3) public disclosure of private facts; and (4) false light in the public eye.[45] As Professor Elder points out,[46] the 1927 Kentucky case of *Brents v. Morgan*[47] was the first to impose liability for public disclosure of private facts.[48] Kentucky decisions have also recognized actions for appropriation of name or likeness[49] and for intrusion upon seclusion.[50] However, apparently the Kentucky courts had not specifically adopted the "false light" version of invasion of privacy until 1981 when *McCall v. Courier-Journal & Louisville*

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[39] 443 U.S. 111, 133 n.16 (1979).

[40] *See, e.g.*, Avins v. White, 627 F.2d 637, 649 (3d Cir.) (defendant was consultant for American Bar Association accreditation team), *cert. denied*, 449 U.S. 982 (1980); Bussie v. Larson, 501 F. Supp. 1107, 1114 (M.D. La. 1980) (defendant was a member of National Right to Work Committee); Woy v. Turner, 533 F. Supp. 102, 104 (N.D. Ga. 1981) (defendant was the owner of professional baseball team); Decarbalho v. da Silva, 414 A.2d 806, 813 (R.I. 1980) (defendant was a doctor).

[41] *See* KENTUCKY TORT LAW, *supra* note 1, § 2.07, at 365-66.

[42] Warren & Brandeis, *The Right To Privacy*, 4 HARV. L. REV. 193 (1890).

[43] *See* Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).

[44] RESTATEMENT (SECOND) OF TORTS § 652 (1977).

[45] *Id.*

[46] *See* KENTUCKY TORT LAW, *supra* note 1, § 3.01, at 422.

[47] 299 S.W. 967 (Ky. 1927).

[48] *Id.* at 971. *See also* Trammell v. Citizens News Co., 148 S.W.2d 708, 709-10 (Ky. 1941) (examined doctrine of *Brents* and refused to reject it).

[49] *See* Wheeler v. P. Sorensen Mfg. Co., 415 S.W.2d 582, 585 (Ky. 1967); Foster-Milburn Co. v. Chinn, 120 S.W. 364, 366 (Ky. 1909).

[50] Pangallo v. Murphy, 243 S.W.2d 496, 497 (Ky. 1951); Rhodes v. Graham, 37 S.W.2d 46, 47 (Ky. 1931).

Times Co.[51] was decided. Moreover, the Kentucky Court in *McCall* expressly relied on the Restatement's approach as the conceptual framework for delineating the right of privacy in Kentucky.[52] Thus, according to Professor Elder, Kentucky now recognizes each of the four types of privacy tort as separate and distinct causes of action.

The chapter on the right of privacy closes with a brief consideration of first amendment issues.[53] The author observes that the United States Supreme Court in *Time, Inc. v. Hill*[54] held that the false reports of matters of public interest were not actionable unless the plaintiff was able to prove that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth.[55] This approach applies the actual malice standard to an "involuntary" public figure, and is arguably inconsistent with the Court's reasoning in the *Gertz* case.[56] Thus, in Professor Elder's opinion, the Court will eventually recognize this anomaly and repudiate the *Hill* decision.[57] So far, the Kentucky Supreme Court has taken a conservative position, declaring in *McCall* that it was required to follow *Hill*.[58]

In conclusion, *Kentucky Tort Law* provides a lucid, orderly and thorough review of the law of defamation and privacy in Kentucky. Professor Elder's treatise is a significant contribution to the state's legal literature and will no doubt be extremely useful to Kentucky attorneys.

*Richard C. Ausness**

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[51] 623 S.W.2d at 887. However, Professor Elder discusses a number of prior Kentucky decisions that were consistent with the "false light" theory. *See* KENTUCKY TORT LAW, *supra* note 1, at § 3.05 (citing Engleman v. Caldwell & Jones, 47 S.W.2d 971 (Ky. 1932); Jones v. Herald Post Co., 18 S.W.2d 972, 973 (Ky. 1929); Foster-Milburn Co. v. Chinn, 120 S.W. 364, 366 (Ky. 1909)).

[52] *See* 623 S.W.2d at 887.

[53] *See* KENTUCKY TORT LAW, *supra* note 1, § 3.09 at 454-59.

[54] 385 U.S. 374 (1967).

[55] *Id.* at 387-88.

[56] *See* Rinsley v. Brandt, 446 F. Supp. 850, 856 (D. Kan. 1977) (widely published specialist in the field of adolescent medicine was deemed a public figure invoking the actual malice requirement of *New York Times*). The Supreme Court did not reach this issue in Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974).

[57] KENTUCKY TORT LAW, *supra* note 1, § 3.09 at 458-59.

[58] 623 S.W.2d at 888.

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